

HEARING DECISION

Petitioner:

[REDACTED]

Petitioner's Address:

[REDACTED]
Globe, AZ 85501

Petitioner's Parents:

[REDACTED]
Globe, AZ 85501

Respondent:

Globe Unified School District
501 Ash Street
Globe, AZ 85501

Respondent's Representative:

Denise Bainton, Attorney at Law
DeConcini, McDonald, Yetwin & Lacy
2525 E. Broadway Blvd., Suite 200
Tucson, AZ 85716

Petitioner's Representative:

M. Alex Harris, Attorney at Law
621 E. Gurley Unit C
Prescott, AZ 86301

Impartial Hearing Officer:

Harold J. Merkow
1102 W. Glendale Ave. #116
Phoenix, AZ 85021

Dates of Hearing:

January 6, 7, 9, 2004 and
May 20, 21, and June 21, 2004
(supplemental due
process request)

Date of Decision:

September 7, 2004

This matter came on for hearing on January 6, 7 and 9, 2004 to consider the due process hearing request submitted on October 29, 2003 and on May 20, 21 and June 21 to consider the supplemental due process hearing request submitted on January 9, 2004. The purpose of the hearings was to consider the due process hearing requests of Petitioner's parents seeking an order directing the Respondent School District to comply with the requirements for Petitioner's special education services as set forth in Petitioner's IEP. Petitioner, as well as Petitioner's parents, appeared in person and were represented by M. Alex Harris, Attorney at Law. Respondent school district was represented by Denise Bainton, Attorney at Law.

Petitioner's parents are seeking due process hearings to have Petitioner's IEP for special education services implemented as written and as understood by the parties to the IEP. Petitioner's parents are also seeking an order for compensatory services for those services that have not been provided as required by the IEP. Having heard testimony of the witnesses, having read and considered the exhibits admitted into evidence, having read and considered the parties' oral and written arguments and being fully advised in the premises, the undersigned hearing officer now makes the following findings of fact and conclusions of law and enters the following decision.

FINDINGS OF FACT

1. Petitioner is a [REDACTED] male student who attends high school in the Respondent School District. Petitioner suffers from [REDACTED]

[REDACTED] which displays symptoms of [REDACTED]

[REDACTED] Because of this syndrome, Petitioner's physical stature is [REDACTED]

[REDACTED] (Ex. R-17). In his most recent physical assessment performed in October 2003, Petitioner's physician wrote "[REDACTED]

[REDACTED]. He continues with minimal communication skills and is still unable to demonstrate where he is hurting or explain that he is not feeling well. He is not able to help himself or perform his ADLs and has no concept of danger. His supervisory skills continue to be one on one. He is able to walk with supervision but does not have a concept of unsafe conditions. His mental change is unchanged ranging from 9 months and 3 years depending on the skill level that he is attempting" (Ex. P-18).

2. Because of his handicapping conditions, Petitioner receives special education services from the Respondent School District. Petitioner is enrolled in a self-contained class at the Respondent School District's high school and he rides the bus to school daily. Petitioner is also assigned a one-to-one aide who stays with

Petitioner throughout the school day. Petitioner also receives related services in the form of speech therapy, occupational therapy and physical therapy.

3. In November 2001, Petitioner's mother, together with the Respondent School District developed an IEP for Petitioner. Petitioner's mother had been working with Petitioner to develop his language skills through sign language. The IEP team described Petitioner's present level of performance as follows:

Petitioner [name deleted] lives with his parents. He is not capable of independent living and requires continual adult supervision and monitoring. Petitioner [name deleted] does not interact socially with his peers within the classroom setting or on the high school [name deleted] campus. He does not voluntarily shake hands or greet others unless he is prompted. Behaviors and moods vary from day to day. At times, he is cooperative, happy and/or productive. Or he may be weepy, lethargic, uncooperative and/or easily frustrated. At times, he becomes frustrated when he does not get his way. He sometimes hits himself on the head and/or face with his hands or objects. He may attempt to bite his hands, arms or shoulders. He may bang his head on the table or other surface. Petitioner [name deleted] continues to touch the clothing and/or property of others when their clothing/property is brightly colored, textured or unusually designed. He may grab jewelry or personal items he finds interesting. He is told

"do not touch", "not yours" in a firm voice. His hands may need to be blocked. It is suggested the other person be forewarned that Petitioner [name deleted] may touch their clothing anyway. He is very strong and may lunge forward. According to previous test results and observation, Petitioner [name deleted] is maintaining previously learned academic skills such as color identification, rote counting, letter identification, numeral identification, rote alphabet recitation; he is unable to legibly write his name utilizing a pencil. He can orally spell his name with verbal prompts. Petitioner [name deleted] continues to complete tasks of sorting, stringing, stacking, pointing, categorizing, pasting, beading, coloring and connecting. He completes simple puzzles, locates hidden pictures and works on different computer programs with assistance if necessary. He goes to the Library to look at magazines or books, eats in the cafeteria unless behavior/mood is inappropriate, attends high school [name deleted] programs as tolerated. Petitioner [name deleted] needs supervision crossing the street because he is not aware of hazards or danger. He continues to be attracted to blinking lights and/or unusual noises or objects. He does not always pay close attention to obstacles or barriers in front of him and may stumble, fall or injure himself. Needs to be monitored and the adult may need to hold his hand, arm, clothing for safety reasons. He will point to objects he wants but he is encouraged to verbalize in order to receive the object.

Verbal expression is sometimes unintelligible. The augmentative communication device was returned to DES during a meeting in May 2000 when the team decided the ACD was ineffective for use with Petitioner [name deleted]. Receptive signing is good; expressive signing skills are mainly limited to his "wants" rather than his "needs". Petitioner [name deleted] can zip up his pants but is unable to independently button and zip his own clothing. He needs assistance to hang clothing, he cannot tie his own shoes, fold clothing, cut his food, blow his nose, thoroughly brush his own teeth. Petitioner [name deleted] needs help to open food packages and containers. He continues to put excessive amounts of food in his mouth. Petitioner [name deleted] utilizes a visual model to set the table. He is able to use a spoon and fork correctly most of the time. Self care skills are weak and he remains dependent on adult assistance and direction. Petitioner [name deleted] is able to get on and off the bus with assistance as needed. He needs verbal prompts to use the handrail. He is able to climb high school [name deleted] building stairs without too much difficulty. Pencil and/or crayon grip is poor. He appears to dislike writing and coloring skills. Petitioner [name deleted] verbalizes "eat", "milk", "cracker" when hungry. He can also sign these words. He verbally asks for "toy", "robot", "book"; he occasionally will say "pee-pee". He does not consistently answer yes-no questions. Petitioner [name deleted]

needs to be wiped by an adult after a bowel movement and he needs help to wash and dry his hands (Ex. R-16).

4. The IEP team developed goals for Petitioner including 1). improving his communication skills, 2). following verbal, written and sign language directions, 3). clothes washing, 4). improving communication using a Picture Exchange Communications System (PECS) to augment verbalization, 5). increasing use of eye contact, 6). improving speech intelligibility, 7). increasing his attention span, 8). improve his ability to hold a writing instrument, 9). improving his ability to copy, trace and imitate objects, 10). improving bilateral coordination skills, 11). improving visual perceptual skills, 12). increasing bilateral hand use with increased fine motor coordination, 13). physical therapy goals of for hamstrings to allow for position changes during the school day and to improve ambulation, 14). improving his fitness level and, 15). speech therapy (Ex. R-16).

5. The IEP team's placement decision was to put Petitioner in a self contained resource room which "allows Petitioner [name deleted] to concentrate on attaining IEP goals/objectives developed for him without increased noise, activity level and other distractors. No potential harmful effects are noted. Quality of services is not affected by this placement".

6. Because Petitioner's mother worked with Petitioner using sign language, the IEP specified that Petitioner would be instructed using ASL as well as verbally

and with PECS. Related services to be provided to Petitioner included Occupational Therapy, Physical Therapy, Adaptive PE and Speech/Language Therapy.

7. Shortly after the IEP was developed, Petitioner's mother sought mediation to resolve her complaints that the District was not complying with the terms and requirements of the IEP. Petitioner's mother and a school representative met with the mediator and an agreement was reached which agreement was reduced to writing (Ex. R-5). In June 2002, Petitioner's mother filed a complaint with the State Department of Education against the Respondent School District. The District and Petitioner's mother arrived at an agreement for resolution of the complaint and the State Department of Education memorialized that agreement by letter dated December 4, 2002 (Ex. R-4). The District and Petitioner's mother were to meet and develop a Functional Behavioral Assessment of Petitioner and resolve the issue about the use of sign language.

8. The IEP team agreed that the November 2001 IEP would be carried over and that the goals and objectives would continue to be followed pending development of a transition IEP for Petitioner.

9. On February 7, 2003, the IEP team met to develop a transition IEP for Petitioner (Petitioner's mother had been appointed by the Court as Petitioner's legal guardian). In anticipation of the development of a transition IEP, the District began preparing a Functional Behavioral Assessment (FBA) which was designed to "gather broad and specific information in order to better understand the specific

reasons for the student's problem behavior. Teams develop hypothesis statements as a result of the assessment process. Hypothesis statements serve a number of purposes including a) to summarize assessment results, b) to offer explanations for the student's problem behavior and, c) to guide the development of behavior support plans" (Ex. R-18).

10. In connection with the development of the transition IEP, Petitioner's present level of performance was described as follows:

Petitioner's [name deleted] disability does prevent comprehension of or complying with the school's attendance, tardy and behavioral policies. Petitioner [name deleted] has been classified as SMR and VI. He is an intensive student who has a 1:1 aide. Petitioner [name deleted] will not be given the AIMS-A test since he is 18 years old. Petitioner [name deleted] is totally dependent on his parents, family and caregivers. This is an ongoing process. Petitioner's [name deleted] daily activities are comprised mainly of daily living skills. On 1/31/03 an FBA meeting was held to discuss the observation results and to go over recommendations and suggestions. Parents would like to have further observations done in additional settings so a more complete picture of Petitioner's [name deleted] behavior can be observed. Petitioner's [name deleted] communication consists of verbalization, ASL, PECS, picture book and sign cards. Petitioner [name

deleted] has demonstrated that he has some understanding of his picture book. Given a verbal cue Petitioner [name deleted] will go through his book looking for an activity or object that he wants. He will then sign and verbalize "I want, please". Petitioner [name deleted] appears to be verbalizing more than the start of this school year. This appears to depend on his mood for the day. Not only is he using words such as: eat, cracker, cookie, papa, book, I want, help me please, we have heard him say several times motorcycle, alligator, exit and fire truck. When signing Petitioner [name deleted] needs to only sign the important words where as the adult needs to verbalize the whole sentence to Petitioner [name deleted]. Even though Petitioner [name deleted] will sign the important words Petitioner [name deleted] should verbalize the whole sentence. It is also important that Petitioner [name deleted] has his tasks broken down into small segments. This should help Petitioner [name deleted] to not become as frustrated and hopefully in time Petitioner [name deleted] will recognize there is a beginning and an ending to the task he is doing. Petitioner [name deleted] will not be taking any electives or academic courses while at high school [name deleted]. He will participate in activities such as music (junior high classroom), APE (high school gym), computer (intensive classroom) along with going to the library at the high school. As mentioned in previous IEP, Petitioner [name

deleted] continues to work on some cognitive skills such as: color, letter, and number identification, rote counting, rote alphabetizing. When practicing his name Petitioner [name deleted] can write his name somewhat legibly if he has hand over hand assistance. Petitioner [name deleted] can spell his name if he is given the first letter of his name. He has even on occasion spelled aide's [name deleted] name with a cue of the letter "J". Petitioner [name deleted] continues to work on tactile activities such as sorting, stringing, pasting, stacking, coloring, cutting, texture activities, buttons, snaps, zippers, lacing, matching objects with shapes. Additional activities are hidden pictures, therabands and putty. These are only a selection of activities that Petitioner [name deleted] does. A rocking chair would also be beneficial for Petitioner [name deleted]. One has been brought for his use in the classroom. Petitioner [name deleted] enjoys doing activities that stimulate him by sound as opposed to activities that are non movable or audible sound. Petitioner [name deleted] still has motor skill problems. When getting off and on the bus he needs to have verbal cues to remind him to use the hand rails. This is also needed when using the ramp outside our classroom door. When using stairs Petitioner [name deleted] needs to have verbal cues to hold on to the rail. Petitioner [name deleted] will periodically work on crafts as a class project. This will help him with fine and gross motor skills. Petitioner [name deleted]

needs to have assistance when using the restroom especially after a bowel movement. The adult needs to wipe Petitioner [name deleted] first since his arms/shoulders make him unable to be successful with this. He then can be given a piece of toilet paper for him to try to clean himself. He will need help to wash and dry his hands especially removing the soap. The adult should stand behind Petitioner [name deleted] with their hands on his elbows. This helps to get Petitioner [name deleted] to be more successful with his task. Teeth are brushed on a daily basis. He will brush his teeth but needs assistance to make sure they are completely brushed. In the lunch room Petitioner [name deleted] will use PECS, verbalize and show a picture of what he has chosen to eat. With poor motor skills Petitioner [name deleted] has a hard time to carry his food to his table especially food items that are loose so the adult will need to carry his tray. He is learning to use utensils as opposed to his fingers. Petitioner [name deleted] still needs verbal cues to have him slow down with his eating, and to chew his food. Café supervisor [name deleted] works closely with the staff to insure that Petitioner [name deleted] is given food that meets his needs. Each month a calendar of each day's food is sent to his parents to circle Petitioner's [name deleted] food for his lunch. When Petitioner [name deleted] goes for music or a walk the weather needs to be considered. If the day is windy or cold Petitioner [name

deleted] may not do these activities. Petitioner's [name deleted] allergy medicine must be in a container that indicates this is Petitioner's [name deleted] medicine/dosage. This must be administered by the school nurse. When Petitioner [name deleted] goes for a walk or to his music class at the junior high for his safety he should wear a safety belt (with loops) or hold on to an adult by his hand or at his wrist. Parents agree to provide a drafting table that Petitioner [name deleted] will use to help with his posture in keeping his head held up when he is looking at books, magazines and tasks that may deal with crayon activities. Petitioner's last report completed 4/13/01 indicates that Petitioner's [name deleted] behavior was characterized by preservation which means a significant delay in all areas of development. Petitioner [name deleted] will have a tendency of repeating behaviors over and over. He may have significant problems to follow even one step directions. Dr. also states that Petitioner [name deleted] may have severe executive deficits which may interfere with him being successful with a given task and as well as interacting with others. Petitioner [name deleted] will have tendencies to be impulsive and does not understand consequences of behavior that may result in a dangerous situation or the outcome associated with stimulus-boundedness. With this, Petitioner [name deleted] needs to have ongoing monitoring at all times. This is achieved by having a 1:1

aide. Being that Petitioner [name deleted] has limited communication skills the use of ASL, picture books, verbal usage, sign cards have been utilized. When Petitioner [name deleted] becomes frustrated he will fold his hand, bang his head, act as if he wants to bite himself, and will turn away from his 1:1. The behaviors mentioned above have not occurred often. The most frequently observed behavior (when Petitioner [name deleted] does not want to do his given task) is the folding of his arms and lowering his head as a refusal to do the task. Petitioner's [name deleted] behaviors and moods vary from day to day, which can contribute to how well he may participate in his daily tasks. Petitioner [name deleted] is responding to "not yours" and "do not touch" more frequently. With Petitioner [name deleted] touching others this appears to not be happening on a regular basis in the intensive classroom, at the junior high school for music, the library, nor the cafeteria at lunch time. Petitioner [name deleted] does not interact socially with his classmates or high school [name deleted] staff. When given several verbal cues to say "good morning, goodbye", he will respond with a clear audible response. Mrs. F [name deleted] has conducted observations of Petitioner [name deleted]. The parents are requesting that she further make observations to observe Petitioner's [name deleted] behavior in settings where his inappropriate touching may occur. The team met on January 31, 2003 to review the

findings. On some days Petitioner [name deleted] will come to school and it appears that he is "weepy". These days he is more frustrated with doing the tasks that are given to him to do. Parents keep the staff well informed on how his mornings are before he comes to school. It is on these days that they report he was "weepy" at home that we have more frustration at school. A concern that the parents have is that Petitioner [name deleted] will grab at individuals' clothing especially when clothing is brightly colored, very textured and jewelry is worn. This has been discussed in prior meeting. Petitioner [name deleted] has exhibited this behavior at school but only a few times. He does exhibit this behavior with objects that are not his that may be on a desk, table. This is especially true if he sees a magazine. His 1:1 aid will redirect Petitioner [name deleted] by standing in front of him and verbally saying "not yours". This will take several verbal cues before he will put the object down. She will then sign and verbalize to Petitioner [name deleted] "I want". Petitioner [name deleted] will then sign and verbalize "I want". When wanting to make sure Petitioner [name deleted] is actually paying attention the adult needs to make sure Petitioner [name deleted] is looking at their face and the adult will put their finger in his ear and verbalize "listen" (Ex. R-2).

11. The IEP team wrote that, for a transition plan, Petitioner [name deleted]

is totally dependent on his parents, family and caregivers. He continues to need constant supervision and monitoring on a daily basis. His transition goals should reflect areas that will help Petitioner [name deleted] to become more independent. Areas to be considered are (hygiene, eating, safety, daily life skills). Petitioner [name deleted] has been working on laundry, brushing his teeth, eating with fork/spoon, washing hands, cleaning up after himself, using hand rails (off and on the bus, walking). Some new skills we will work on are making a bed, walking, crossing the street, picture schedule board. Some of the above activities were discussed at the January 31 meeting. With Petitioner [name deleted] having problems following directions this should be an area that is heavily emphasized. Parent has indicated that Petitioner [name deleted] will remain in school until 2006 school year (Ex. R-2).

12. The IEP was completed on March 24, 2003 and it included classroom goals, life skill goals, adaptive PE goals, occupational therapy goals, physical therapy goals and speech therapy goals. In addition, the Functional Behavioral Assessment was to be completed and goals were to be developed for overcoming concerns about Petitioner's safety, security and impulsivity. Also, the IEP team agreed that staff and providers would receive sign language training.

13. On May 7, 2003, shortly after the IEP team completed the IEP for Petitioner, Petitioner's mother filed a complaint with the State Department of Education, alleging that the District failed to comply with the terms of the mediation

agreement, the District failed to comply with the agreements reached in early resolution and that the District was not providing FAPE. In particular, Petitioner's mother alleged that the Functional Behavioral Assessment had not been completed, the IEP had not been completed, ASL was not used during the school year, related services were not provided as written and compensatory time for extended school year services was not provided.

14. The Department of Education conducted an investigation into Petitioner's mother's allegations and, on June 5, 2003, it issued its decision. In respect to the allegation about sign language, the State Department of Education found that the Respondent School District was not in compliance as the IEP was "not clear as to the type and level of 'signing' services he would receive". For corrective action, the State Department of Education ordered that the IEP team meet to "determine the level of compensatory services, if any, the district shall provide to Petitioner [name deleted] for its failure to accurately reflect the 'signing services' to be provided during the 2001-2002 and 2002-2003 school years" (Ex. R-3). All of the other issues raised by Petitioner's mother in her complaint to the State Department of Education were decided in favor of the Respondent School District.

15. On June 26, 2002, the Assistant Superintendent wrote to the Arizona State Department of Education. In respect to the issue raised by Petitioner's mother regarding completion of the Functional Behavior Assessment, he wrote "The Functional Behavior Assessment was finalized on June 19, 2003. An initial

Functional Behavior Assessment was completed during December 2002. On January 31, 2003 a meeting was held to discuss the results of that assessment. At an IEP meeting held on February 7, 2003, Petitioner's mother [name deleted] requested that more information be gathered, and that the District employ a behavioral consultant [name deleted] to assist in the completion of the FBA. Her request was granted. Petitioner's mother [name deleted] was to contact the Assistant Superintendent [name deleted] to set up another meeting by April 15, 2003 but she never did. A certified letter, which was never picked up from the post office, and a hand-delivered letter by her husband were sent to remind her of the need to meet. She did not respond until a meeting notice was sent setting the meeting date for June 19, 2003". The Assistant Superintendent also addressed Petitioner's mother's complaints regarding occupational therapy services and speech therapy services.

16. Between January 31, 2003 and the June 19, 2003 meeting, the Respondent School District employee who completed the Functional Behavioral Assessment [name deleted] and the Functional Behavior consultant [name deleted] refined the Functional Behavior Assessment to include positive reinforcement, modeling, rewards and ignoring poor behavior. "Since the initial report, recommendations and team meetings, many of the initial recommendations have been integrated into Petitioner's [name deleted] school day. Consultant [name deleted] and his assistant have spent time with Petitioner [name deleted] and initiated staff

training of behavior modification techniques. A rocking chair for sensory stimulation has been used with a calming effect in the classroom. Environmental stimulation has been restructured with an increase in Petitioner's [name deleted] ability to focus. A slant board has been introduced with the result of improved reading/article viewing posture. PT has been very supportive in working on Petitioner's [name deleted] trunk and stretching needs. At this time it is important to identify the next phase of Petitioner's [name deleted] FBA, as mentioned previously modifications will need to be an ongoing part of the FBA program. Shifts in Petitioner's [name deleted] behaviors will be gradual and require modification of approaches based on Petitioner's [name deleted] responses. Consultant [name deleted] has introduced, through a brief staff in-service, a behavioral modification concept and program based on auditory feedback".

17. In April 2003, Petitioner fell and was injured. His physician ordered that all physical therapy, occupational therapy and adaptive PE be suspended. From the time of his injury, Petitioner did not receive any physical therapy, occupational therapy or adaptive PE for the remainder of the 2002-03 school year. At Petitioner's mother's request, Petitioner was not provided Extended School Year services during the summer of 2003.

18. On June 19, 2003, the IEP team met to discuss the findings of the State Department of Education regarding Petitioner's mother's complaint as well as the Functional Behavior Assessment. The Team decided that school staff would take

classes once each week to become familiar with total communication, including sign language. The Team also accepted the FBA (subject to Petitioner's mother's review by August 11, 2003) and agreed that staff and parent would meet in August for in-service training to develop goals for the FBA.

19. Following the June 19, 2003, meeting, Petitioner's mother requested that additional observation for the Functional Behavioral Assessment be performed to include observations of Petitioner in community settings. No additional community observation was performed by the Respondent School District employee who performed the observations which were already included in the FBA.

20. Petitioner's mother then filed subsequent complaints with the State Department of Education regarding sign language compensatory time, regarding the Functional Behavior Assessment, regarding occupational therapy and she included complaints about several other matters. The Corrective Action Coordinator addressed each of Petitioner's mother's issues and the State Department of Education took no further action in respect to those issues.

21. Petitioner is a client of the Arizona Developmental Disabilities Division (of the Arizona Department of Economic Security). At some time during 2003, Petitioner's mother requested that DDD pay for a sign language tutor for Petitioner. Petitioner's mother selected a sign language tutor for Petitioner who has been working with Petitioner on a weekly basis since.

22. When the 2003-04 school year began, Petitioner was under the same

restriction about not receiving occupational therapy, physical therapy and adaptive PE. After Petitioner was seen by his physician in September 2003, his physician allowed him to "resume all school physical therapy treatments". Although the physician's note was dated September 23, 2003, Petitioner's parents did not obtain the note until September 29. No evidence exists in the record of this matter to show when the Respondent School District received the physician's note but the evidence suggests that Petitioner's mother sent a copy of the note to Petitioner's teacher on October 3 (Ex. R-25).

23. When services were resumed, Petitioner was provided with physical therapy and adaptive PE at the local hospital instead of at the Respondent District High School. Petitioner's father gave permission for the change of location after he was notified that there was only one physical therapist at the hospital who could not shut down his clinic in order to provide services to Petitioner at the high school. Because of the change of location, Petitioner was transported to the hospital by school bus and Petitioner was accompanied by his 1:1 aide. Occupational therapy services were provided at the Respondent District High School by a certified occupational therapy assistant (COTA) with whom the District contracted to provide services and occupational therapy services were provided in accordance with the goals written into the IEP.

24. On October 27, 2003, Petitioner's mother filed a due process hearing request. Her request itemized eight issues alleging that "the district has failed to

follow IDEA". The issues alleged are: 1). District has failed to provide parent with a copy of Petitioner's [name deleted] file; 2). District has failed to complete the IEP in a timely manner; 3). District has failed to complete the Functional Behavioral Assessment in a timely manner; 4). District violated student confidentiality; 5). District is in non-compliance with related services in the IEP; 6). District has failed to provide Petitioner [name deleted] with FAPE; 7). District has failed to comply with mediation/early resolution agreement; and 8). Parents are asking for compensatory services in O.T. because there were no gains and the services were not provided as per the IEP.

25. An evidentiary hearing was conducted on January 6, 7 and 9, 2004. At the conclusion of the hearing, Petitioner filed a supplemental due process request, which request was incorporated into the original due process hearing request. Hearing on the supplemental due process hearing request was conducted on May 20 and 21, 2004 and on June 21, 2004.

CONCLUSIONS OF LAW

1. Petitioner is entitled to a free, appropriate public education within the least restrictive environment.

2. All due process rights to which Petitioner and his parents are entitled have been provided.

3. All notice requirements to which Petitioner and his parents are entitled have been provided by the Respondent school district.
4. Petitioner is entitled to receive special education services based on a handicapping condition of mental retardation, visual impairment and other related physical limitations.
5. Petitioner receives related services in accordance with his current IEP.
6. Petitioner receives classroom services in accordance with his current IEP.
7. The Respondent School District completed a Functional Behavioral Assessment for inclusion in Petitioner's IEP in a timely manner. The Respondent School District completed a Functional Behavioral Assessment in sufficient detail to be able to create behavior modification interventions necessary for Petitioner's care, safety and welfare.
8. Respondent School District has provided instruction to Petitioner utilizing sign language in accordance with the requirements of the IEP.
9. No competent evidence exists in the record of this matter on which to conclude that the Respondent School District has unilaterally changed any provision of Petitioner's IEP. No competent evidence exists in the record of this matter on which to conclude that agreements made through consensus by the IEP team have not been incorporated into Petitioner's IEP.
10. Petitioner is being provided special education services in accordance with the requirements of a free, appropriate public education (FAPE).

11. Respondent School District is the prevailing party in this due process action.

HEARING OFFICER'S DECISION AND ORDERS

It is the decision of the undersigned hearing officer that Petitioner's due process hearing requests are denied. Respondent School District is the prevailing party in this action.

Petitioner requests relief based on the contentions that 1). the Respondent school district has failed to provide the parents with Petitioner's complete educational record; 2). that Petitioner is not being provided the related services to which he is entitled; 3). that the IEP was not completed in a timely manner; 4). that the District has been delinquent in providing educational services to Petitioner using sign language; 5). that the District unilaterally changes the IEP; 6). that the IEP specified services are not being provided as written; and 7). the Respondent school district does not provide proper instruction to Petitioner in accordance with FAPE.

Respondent School District raised a defense that some of the claims alleged by Petitioner were barred by the statute of limitations. In Dreher v. Amphitheater School District, 22 F. 3d 228 (1994), the Ninth Circuit limited actions brought in the State of Arizona under IDEA to one year from the date of accrual. The undersigned considered Respondent's argument and hereby rules that, any claim that could

have been brought within a one year period from when Petitioner knew or should have known about the right to seek a due process hearing and was not submitted for a due process decision, is barred from consideration in the instant hearing. Additionally, any claim brought in the instant due process hearing that was adjudicated by the Arizona Department of Education through the complaint process is deemed by the undersigned to be *res judicata* to that time and will not be further considered by the undersigned. Furthermore, due process hearing request claims that are not properly before a hearing officer for adjudication will not be addressed. The remaining claims cited by Petitioner, as illustrated above, will be addressed.

At the outset, it must be said that Petitioner's mother is not a reliable, steady partner with the Respondent School District to ensure that Petitioner learns life skills necessary to subsist in the world. While Petitioner resides with his immediate family now, it is incumbent on everyone who has Petitioner's best interests at heart to develop a school environment in which Petitioner may learn to attain more independence, where Petitioner can learn to perform daily living skills independently, where Petitioner can learn to relate better to others in various environments and where Petitioner can learn to communicate his needs to others who are not exposed to Petitioner on a regular basis. Petitioner's mother seems to be creating roadblocks to those goals.

Unfortunately, the Division of Developmental Disabilities (DDD) is not helpful either. The Division has uncritically accepted Petitioner's mother's wishes for

Petitioner's supposed development without integrating her wishes with the collective experience of the Respondent School District and without any critical examination of its own about whether Petitioner's mother's wishes are in Petitioner's best interests. Resources which could be better used to make Petitioner more independent are being squandered on attempts at ancillary sign language proficiency – DDD personnel seem to be unwilling to make an independent assessment of Petitioner's needs or to work with the Respondent School District to accomplish the goals of making Petitioner more independent as a developmentally disabled adult.

Inclusion of sign language usage in Petitioner's IEP is truly a canard and the Respondent School District's agreement to include "pidgin" sign language use to mollify Petitioner's mother is misguided. Sign language does nothing to develop Petitioner's communication skills and, there is enough evidence in the record to show that Petitioner's use of sign language decelerates Petitioner's communication skills. In fact, despite Petitioner's mother's declaration that sign language is essential at home, Petitioner's father testified that he does not know sign language and, when Petitioner makes signs at home that he does not understand, he directs Petitioner to his mother!

Nonetheless, Respondent School District has tried to accommodate the sign language element in Petitioner's IEP by requiring sign language instruction for all personnel who have contact with Petitioner, especially Petitioner's teacher and 1-1

aide. The evidence in this hearing suggests that most of Petitioner's sign language usage is 'receptive' rather than 'expressive'. As Petitioner wrote in the post-hearing memorandum "It is important to remember that Petitioner [name deleted] will not be in the work force or go out into the public by himself. His communication will be with those closest to him". It is all the more necessary then, that Petitioner learn to communicate in a manner that is used by those with whom he will have contact. Verbalization, not sign language, is the communication mode which Petitioner must develop because he cannot expect that people in his environment will be able to recognize his signs (indeed, his own father cannot) and he cannot expect that people will *try* to communicate with him using sign language (witness his interaction at a fast food restaurant).

Indeed, one need look no further than the description in the transition IEP about Petitioner's present level of performance regarding communication:

Petitioner [name deleted] communicates using a variety of modes, including: Picture Exchange Communication System (PECS), speech, sign, movement toward a desired object, gesture, and using his communication partner's finger to point. Most communications are one and two word utterances. Petitioner [name deleted] uses his communication skills to make requests and not to comment. He is able to make choices using pictures or objects but does not answer yes/no questions appropri-

ately with any consistency. Much of his speech is understandable to those familiar with him and these same people can understand many of his signs. The signs are often used to help him put his feelings, wants and needs into words by someone else signing and him reading those signs. The PECS are the most effective way for him to interact with a wider variety of communication partners. Petitioner [name deleted] continues to have difficulty with pragmatic communication skills like making and maintaining appropriate eye contact and asking for an object or activity before getting it or doing it.

The people closest to him right now are his teacher, his 1-1 aide and his mother. If one looks beyond the next three years of Petitioner's transition plan, one must ask with whom Petitioner will be closest (Petitioner's mother's health problems limits her interactions with Petitioner and neither the teacher nor the 1-1 aide will be available as a resource). One must then inquire whether Petitioner's long-term interactions will require verbal skills or sign language skills -- the obvious answer is the former.

Sign language is nothing more than a means to an end. Petitioner's symbol communication through sign language is not designed to be anything more than a rudimentary effort to focus his attention on communicating his wants and needs. Sign language use, though, has the inherent effect of miscommunicating Peti-

tioner's wants and needs since Petitioner has limited vision and a very short attention span (the observation that Petitioner will fold his arms and put his head down when unwilling to perform a task is a huge impediment to using sign language). Indeed, when Petitioner avoids eye contact, sign language is useless. It is certainly more compelling for the Respondent School District to increase Petitioner's **verbal** skills and **listening** skills than to go through the motions of teaching gestures which most people with whom Petitioner will interact will have no way of understanding.

Although Petitioner's mother insists that Petitioner's sign language development parallels his verbalization skills, it is evident watching Petitioner during the evidentiary hearing and listening to the descriptions of his interactions with others that Petitioner's sign language skills are less than rudimentary, that, with the exception of Petitioner's mother, those outside the school environment cannot communicate with Petitioner using sign language (including Petitioner's father and Petitioner's mother's best friend) and that development of verbalization skills through recognized teaching tools (PECS), verbal commands and verbal structure will greatly enhance Petitioner's ability to communicate with those who will be closest to him in the future (Petitioner is required to verbalize and use PECS in the cafeteria). When Petitioner resides outside of his present home, he cannot and should not expect that people will be able to communicate with him through "pidgin" sign language.

Petitioner's mother decries the loss of signed words that Petitioner is able to display and she attributes that loss to the Respondent School District. Her angst is misplaced. Petitioner has acquired more verbal skills since the IEP was developed, he uses the PECS system more adeptly and he can initiate his wants and needs using **words**, instead of signs (the anecdotal evidence observed in the present level of performance shows that words and signs are used for the same thing, e. g. 'not yours' and 'I want'). Since the goal of his IEP is to increase verbalization, Petitioner is demonstrating progress. Also, Petitioner's mother's insistence on emphasizing sign language is incredibly anomalous considering that Petitioner receives **SPEECH** therapy three times a week.

Petitioner's mother complains that staff has not learned to communicate with Petitioner using sign language (as agreed during the parties' mediation and as ordered by the Arizona Department of Education during the complaint process) and that Petitioner is being deprived of a free, appropriate public education because the direction to teach Petitioner independent living skills relies on verbalization.

Petitioner's mother insists that Petitioner's proficiency in sign language has decreased significantly because the Respondent School District has not been communicating with Petitioner through sign language and she expects an order directing compensatory education as a result. The undersigned is not convinced that Petitioner ever knew as many as 250 signs (indeed, his demonstration during the hearing showed that he barely knew 10 signs), the DDD sign language tutor

believes that Petitioner is able to make signs for elementary concepts such as "mother", "father", "sister", "work", "crackers", "batteries", "bathroom", "please", "thank you", "toys" and "lives" but that she needs to clap her hands or move his face to gain eye contact in order to have Petitioner even practice with her. Additionally, the 1-1 aide is already proficient with Petitioner's signing abilities having taught herself enough to be able to work with Petitioner *on a daily basis*.

The undersigned believes that, regardless whether the Respondent School District fulfilled its obligations under the mediation program (there is a different 1-1 aide now than there was in 2002) and, notwithstanding the regular attendance of classroom staff at the "pidgin" training during 2003, Petitioner has not been deprived of sign language use that is required by the terms of his IEP.

In respect to encouraging Petitioner to use sign language, the undersigned has stated above that the promotion of sign language is misguided. Indeed, one need look no further than Petitioner's related services to see that two of the three providers who have no sign language skills are more than adequately able to provide physical therapy, adaptive PE and occupational therapy services. The speech therapist uses signs with Petitioner – only because she can.

Petitioner is able to see and hear (Petitioner does not require any augmentative communication device). He is being trained to perform independent living skills to the extent he will be able to perform such skills in a protected environment. He has an aide present with him all day long and he is in a self-

contained classroom all day long (with exceptions for therapy, lunch and library). His future is not likely to be any more independent than it is now and it is evident that he will require constant attention and constant supervision. In order to communicate in an enlarged environment outside of the school, he needs to acquire communication skills that his caregivers and the public will use to interact with him. That form of communication is not sign language, it is spoken language.

Petitioner's mother declares that sign language is the best way to teach Petitioner how to verbalize. There is no scientific or expert information in the record of this matter to support that declaration (there is no evidence in the record to show that Petitioner has learned any new signs that are assisting him in acquiring verbalization skills [and there is no evidence at all that Petitioner has grasped the structure of ASL]) and the record instead supports the collective wisdom of educational professionals that using sign language is of no benefit in teaching Petitioner verbalization skills. If Petitioner needs to learn multi-dimensional concepts of time, space, scheduling, activities and relationships, the evidence is bereft of any such learning when Petitioner uses sign language.

Petitioner's mother also avers that, because sign language is used at home, the school has an obligation to maintain continuity with the home environment and use sign language as a means of communication (one must wonder why there was no demonstration of parent-child interaction through sign language at the evidentiary hearing). The evidence, though, is equivocal about home sign language

use. Petitioner's father's sign language skills are limited (he testified that he understands when Petitioner wants to watch television, play with toys, go to bed or eat). Petitioner's mother's friend testified that she observes sign language interaction between Petitioner and his mother but that Petitioner's *oral* communication at home is better ("he acts like he understands better") and that she is able to understand him better at his house because he *speaks* better.. Since Petitioner's mother has the most contact with Petitioner outside of the school environment, the undersigned would have expected that she could report about Petitioner's increasing **verbal** skills – instead, she complained about his declining sign language skills.

Without increasing verbal skills, Petitioner's social skills will not advance. Without additional social skills, Petitioner will be increasingly isolated. Verbal communication, especially having an ability to initiate needs, wants and feelings, is the key to Petitioner's success. Sign language is a dead-end for Petitioner and it is counterproductive to his transition plan.

Since the use of sign language is not quantified in the IEP, one must ask how FAPE is denied by the Respondent School District's limited use of "pidgin" sign language, primarily as an attention-getter. One must also wonder how 'pidgin' sign language is accretive to Petitioner's language acquisitions skills. Petitioner has not presented any authority to indicate under what circumstances and to what extent FAPE is denied when sign language is auxiliary to the goal of verbal communication

skill development. Petitioner has presented no authority to prove that, given the goals and objectives of Petitioner's IEP, the complete elimination of sign language as an attention-getter would deprive Petitioner of FAPE.

Respondent School District went to great lengths to comply with the Arizona Department of Education's dictate about using sign language with Petitioner after Petitioner's mother filed a complaint against the District. Since sign language should be neither the predominant nor the preeminent means of communication that Petitioner's verbalization goals expect him to develop, the sign language skills acquired by those who work with Petitioner on a regular basis are satisfactory and no redress is necessary. Accordingly, Petitioner's claim that the Respondent School District has failed to implement the sign language requirement of the IEP is overruled. No compensation is owed to Petitioner for any claimed deficiency in sign language use by the Respondent School District.

Along the same lines, Petitioner's mother claims that the District has failed to perform a complete Functional Behavioral Assessment in a timely manner. Petitioner's behaviors have been observed in a variety of settings – in school, at home and traveling in a vehicle. A plan was developed to meet concerns for Petitioner's safety, impulsivity and security, which plan is designed to modify Petitioner's unacceptable behaviors and reinforce his positive behaviors. The Respondent School District contracted with the consultant suggested by Petitioner's mother who also made observations of Petitioner's behaviors and who reported his

findings to the IEP team. Yet, Petitioner's mother insists that the observations are insufficient, that Petitioner has not been observed in enough different settings in the community and the IEP is unable to incorporate behavior modification tools into the IEP.

Irrespective of the difficulties that delayed the discussions of the Functional Behavioral Assessment (and Respondent School District cannot be held accountable for delays associated by Petitioner's mother inability or refusal to meet), it is evident that the assessment as it currently stands, is complete, that it incorporates all of the observations necessary to develop behavior modifications and that the behavior plan as adopted by the IEP team is adequate to address those issues of safety, security and impulsivity that have been observed (especially by using **verbal** cues and corrective prompts).

Unquestionably, Petitioner's impulsivity is a fundamental problem that requires intercession. In 2001, the IEP team made the observation that "Petitioner [name deleted] continues to touch the clothing and/or property of others when their clothing/property is brightly colored, textured or unusually designed. He may grab jewelry or personal items he finds interesting". The 2003 IEP team found that "Petitioner [name deleted] is responding to "not yours" and "do not touch" more frequently. With Petitioner [name deleted] touching others this appears to not be happening on a regular basis in the intensive classroom, at the junior high school for music, the library, nor the cafeteria at lunch time" and "A concern that the

parents have is that Petitioner [name deleted] will grab at individuals' clothing especially when clothing is brightly colored, very textured and jewelry is worn. This has been discussed in prior meeting. Petitioner [name deleted] has exhibited this behavior at school but only a few times. He does exhibit this behavior with objects that are not his that may be on a desk, table".

Equally as important is Petitioner's safety. The 2001 IEP team noted "Petitioner [name deleted] needs supervision crossing the street because he is not aware of hazards or danger. He continues to be attracted to blinking lights and/or unusual noises or objects. He does not always pay close attention to obstacles or barriers in front of him and may stumble, fall or injure himself. Needs to be monitored and the adult may need to hold his hand, arm, clothing for safety reasons" and the 2003 IEP team noted "When Petitioner [name deleted] goes for a walk or to his music class at the junior high for his safety he should wear a safety belt (with loops) or hold on to an adult by his hand or at his wrist. ". Petitioner's father testified that Petitioner is attracted by loud noises.

Extended observations of Petitioner's behavior in a variety of environments is designed to elicit divergences in behavior from one environment to another. Behaviors exhibited in one environment may inhibit progressing towards IEP goals while behaviors in another environment may be completely sanguine. It is the function of the Functional Behavioral team to then assess those differences, assess the behaviors that should be addressed positively and assess those behaviors that

interfere with the student's progress. The Team then should design behavioral interventions to eliminate negative behaviors and accentuate positive behaviors.

In this due process hearing, the evidence is unanimous that Petitioner's negative behaviors are equally distributed **wherever** he is – either in the classroom, at home, at a restaurant, at a store or anywhere else where bright colors, bright lights, loud noises and rapid movement exists. It is immaterial whether Petitioner is observed in every location where these negative behaviors are exhibited, it is enough that the Team has already observed *enough* of those behaviors to create a behavioral intervention plan. Under these circumstances, one cannot conclude that the Functional Behavioral Assessment is incomplete and one cannot conclude that FAPE is being denied to Petitioner simply because he hasn't been observed acting out in Wal-Mart or McDonalds.

The observations about Petitioner's behaviors exist across environments and the inappropriate behaviors must be modified using consistent methods, regardless of environment. It is immaterial whether Petitioner is attracted to brightly colored objects in his classroom or at Wal-Mart (his excursion there in the company of an untrained sign language tutor was disastrous); whoever is guiding him must know how the IEP team wants to intervene to prevent improper touching, lunging at people or objects, being attracted to loud noises, being oblivious to traffic, listening to commands, etc.(and there was little testimony about how Petitioner's parents are implementing the behavior modification protocols or whether they are

even complying with the behavioral intervention plans). Additional observations in the community, at this time, will not assist the IEP team in devising modifications to deal with Petitioner's inappropriate behaviors (interestingly, although Petitioner's mother seeks such observations, when the opportunity arose to have Petitioner observed at Wal-Mart by Petitioner's teacher and aide, Petitioner's mother refused).

Petitioner has not presented any authority to demonstrate how FAPE is being violated by the absence of community observations. There is no evidence in the record to show that Petitioner's compliance with the behavioral intervention plan or Petitioner's skill with behavioral modification protocols is so advanced that the Functional Behavioral Assessment needs to be taken to the next level. Since the IEP is a dynamic document, the undersigned expects that, as Petitioner advances through the behavior modification matrix, additional observations will be required and the behavioral intervention plan will need to be modified. Today, however, the evidence is scant that Petitioner recognizes any of the behavioral tools to modify those already-made observations which interfere with his socialization, safety and independence. As such, Petitioner's mother's contention that the Functional Behavioral Assessment (FBA) is incomplete is overruled.

The seminal meeting for the Functional Behavioral Assessment was held on June 19, 2003. At that meeting, the IEP team members (except Petitioner's mother) were satisfied that the observations adequately described Petitioner's behavioral limitations, that the goals developed to overcome those limitations were reasonable

and that the methods to overcome Petitioner's limitations were reasonable. To now suggest that the IEP was delinquent in formulating interventions to protect Petitioner's safety, overcome his impulsivity and direct his attention is not supported by the evidence in this hearing.

Furthermore, although Petitioner's mother seeks additional observation of Petitioner in a variety of community settings, there is NO evidence in the record of this matter to show that there is any discrepancy between what the Functional Behavioral goals are already expected to achieve and their actual achievement. In fact, there is no showing that even a minimal impact on those goals exists by not observing Petitioner in community settings (one must wonder whether Petitioner's parents withheld their own community observations from the IEP team). Additionally, there is no evidence to show that, but for additional observations, Petitioner's behavioral goals will be eroded or that Petitioner will fail to be in a position to progress in his behavioral goals. Likewise, the development of the FBA was consistent with the requirements of IDEA, see, 34 CFR 300.346. As such, Petitioner's claim that FAPE is being denied because a full evaluation of Petitioner's behavioral challenges in the community is overruled.

While not directly related to Petitioner's independent living goals, Petitioner receives related services in the form of speech therapy, physical therapy and occupational therapy because of his physical limitations. Petitioner's mother has criticized the quantity and quality of those services and she asks for compensatory

services to be provided to Petitioner.

The frivolity of the request is demonstrated by the mis-identification of the providers for speech therapy and occupational therapy in the due process hearing request as well as the amazing reduction in the claim for compensatory services. It is evident that this element of the claim is unfounded and that related services are being provided in accordance with Petitioner's transition IEP.

There are fundamental roadblocks to providing services to Petitioner, both for independent living skills and for related services. First, Petitioner has severe medical problems which cause him to miss school frequently. Second, Petitioner's mother has significant medical issues which prevent her from meeting with District staff to coordinate Petitioner's educational goals. Third, Petitioner's attention span is so short that it is difficult to provide services.

Yet, Petitioner's mother insists that "continuity has been lost" (services were not provided between April and October 2003 because of Petitioner's injury). The undersigned is unable to conclude that related services have not been provided as required by the goals of the IEP. In fact, there is no evidence in the record of this matter on which to conclude that the providers have not been scrupulously following the IEP goals.

Petitioner's mother insists that Petitioner is entitled to compensatory occupational therapy services because the provider did not go to Petitioner's home in order to show certain techniques to Petitioner's mother. There is a dispute in the

evidence about whether the IEP calls for that instruction in Petitioner's parents' home. The IEP occupational therapy goal reads "O.T. will provide parent education of 3-5 sessions to instruct in techniques or tactile defensiveness. Petitioner [name deleted] will demonstrate a decrease in tactile defensiveness by 20%". Petitioner's mother argues that the IEP team meeting notes reflect the location for that instruction, which location was deliberately omitted from the written IEP by the Respondent School District.

Meeting notes created by three participants in the IEP meeting are not the document through which services are provided. The meeting notes reflect the conversations during the meeting, not the consensus of the IEP team. Only the IEP document imposes the duties and obligations of the Respondent School District and, since home instruction is absent from that document, there has not been any denial of occupational therapy services. Regardless of whether there was an intent to provide such instruction in the home, at school, at the occupational therapist's office or in a park, the location for such instruction is not a due process issue anyway since Petitioner's placement is unaffected.

Also, other collateral factors serve to reinforce the undersigned's conclusion. The occupational therapist who volunteered to go to Petitioner's home is not the occupational therapist who began providing services under the transition IEP. The current occupational therapist (actually a certified occupational therapist assistant, COTA) did not know about any discussion at the IEP meeting for home instruction.

When he began providing services, there was nothing in the IEP document which would have alerted him to a need for home instruction and there was no conversation between him and Petitioner's mother suggesting that he come to the home for instruction. In fact, he wrote a letter to Petitioner's mother offering instruction at the school (which letter Petitioner's mother ignored). Based on all of the evidence in the record of this matter then, the undersigned overrules Petitioner's claim about a lack of occupational therapy services, either in terms of quality or quantity and Petitioner is not owed any compensatory services because home instruction was not provided (perhaps if Petitioner's mother was a reliable partner with the Respondent School District, she could have received instruction when the COTA was present at the school).

Petitioner's mother also criticizes the Respondent School District for failing to identify the occupational therapist under whom the COTA works and Petitioner's mother argues that the occupational therapist has violated her professional obligations by not participating in the IEP meetings, by not independently assessing Petitioner and by not supervising the services being provided under the IEP. The evidence shows that the IEP goals were developed before the current occupational therapist's contract began but the IEP goals were created by an occupational therapist. If the presence of an occupational therapist is required at the IEP meetings to develop the next IEP, Petitioner is correct that an occupational therapist's assessment must be made of Petitioner's present level of achievement

and goals must be developed for Petitioner by an occupational therapist. Until then, however, the issue is irrelevant. Furthermore, Petitioner's mother's challenge to the COTA's supervision by the occupational therapist (whose office is in Scottsdale, Arizona) is not an issue for due process. So long as the Governing Board of the Respondent School District is satisfied that the occupational therapist is providing oversight to the COTA, it is not a prerogative of Petitioner's mother to challenge that decision, see ARS, Section 15-341 A. (17).

Petitioner challenges the quantity of occupational therapy services provided during the 2003-04 school year and avers that, since Petitioner was released by his physician to resume related services on September 23, 2003, the failure to provide occupational therapy services during the last week of September requires redress. Based on the evidence adduced at the hearing, the argument is nonsense. Although an exhibit exists showing Petitioner's release was dated September 23, 2003 by Petitioner's physician, the evidence shows, beyond a reasonable doubt, that Petitioner's parents did not receive the release before September 29, 2003 and that they did not provide the release to the school until the beginning of October 2003 (Petitioner was absent on September 29 and September 30). As such, no compensatory occupational therapy services are owed to Petitioner and the undersigned overrules Petitioner's claim for occupational therapy compensatory services.

Petitioner's mother also insists that the Respondent School District is not

following Petitioner's IEP because occupational therapy sessions last too long. The IEP states that no therapy will last longer than 20-30 minutes and, it is reasonable to include that limitation because Petitioner becomes fatigued easily. Yet, no competent evidence exists in the record of this matter to show that any of the related services providers exceed Petitioner's limitations for therapy and indeed, the providers uniformly testified that Petitioner's fatigue is always taken into consideration in deciding the length of a therapy session. One must wonder how Petitioner's mother created this argument at all but, since there is no evidentiary support for the claim, this argument is overruled.

Petitioner's mother also complains that the days on which Petitioner is provided occupational therapy was changed without the consensus of the IEP team. The complaint is not a due process issue but, even if it was a proper issue for consideration by the undersigned, Petitioner's mother has not shown any effect on the services received by Petitioner. This argument is nothing more than carping by Petitioner's mother.

The calendar produced by the Respondent School District, together with the providers' records show that, when Petitioner was at school, he received the related services to which he was entitled. When Petitioner was absent from school or school was not in session, the providers' obligation to provide services did not exist. When the providers were absent on a day that services were to be provided to Petitioner, time was made up by the providers. Petitioner's calculations for the

compensatory service claim are inaccurate and unreliable. The undersigned therefore finds that the Respondent School District did not violate any requirement of the IEP to provide related services to Petitioner and Petitioner's claim for compensatory related services is overruled.

Petitioner contends that "The District engaged in a pattern of doing whatever they saw fit to change, delete or modify without team meeting. Even after sitting through a meeting and agreeing to do something, the District would write a letter stating we're not going to do it. Clearly the District has dishonored the procedure of an IEP and agreements reached in team meetings". In support of that contention, Petitioner's mother argues that meeting notes show consensus which were unilaterally overruled or ignored by the Respondent School District.

Undoubtedly, given the history between Petitioner's mother and the Respondent School District, it would have behooved the District to create a verbatim recording of all conversation during IEP meetings, memorialize all agreements in writing, obtain signatures for all agreements and incorporate those signed agreements in the IEP (Petitioner's mother was likewise able to record all meetings and demand written confirmation of agreements). Instead, the undersigned is left with varying *interpretations* of meeting outcomes as well as to what the participants actually agreed. Since the IEP is the organic document for which the Respondent School District is responsible, all of Petitioner's five claims about unilateral alteration of the IEP are overruled. Indeed, if meeting notes were

expected to be incorporated into the IEP, the undersigned would have expected to find those notes to be part of the IEP exhibit in evidence.

Petitioner insists that the District unilaterally changed the location for physical therapy and adaptive pe services without the agreement of the IEP team. Petitioner's IEP states that the services would be provided at school, however, when the physical therapist informed the Respondent School District that he could not leave the hospital to provide services for Petitioner at school, the Respondent School District sought and obtained permission for a change of location from Petitioner's father. Now, Petitioner's mother wants to renege on that consent. Even as late as the supplemental due process hearing, the circumstances which led to the change of location remained the same – there is only one physical therapist at the hospital and, since he would be required to close the unit to come to the school for Petitioner, he would cease providing services for Petitioner. Clearly, the alternative location is preferable to no services. Again, if Petitioner's mother was a reliable partner with the District, this issue would never have arisen as an element of a due process claim.

Petitioner's mother also contends that the Respondent School District is violating the IEP because the computer disks being used by Petitioner are not age-appropriate. She further argues that, because the District refused to purchase the same computer programs as Petitioner uses at home, his IEP goals are impaired. The evidence shows that Petitioner's parents provided computer programs for the

2002-03 school year and declined to allow the Respondent School District to use those programs for the 2003-04 school year. The Respondent School District then used computer programs which it already owned. Petitioner's mother claims, without any evidentiary support, that the programs used by the District are too advanced for Petitioner (the claim is based on the targeted marketing group on the software packaging). Petitioner's teacher and aide are the best people to assess Petitioner's ability to use those computer programs. Testimony in the record shows that Petitioner enjoys the school-provided programs and that he does well working with them. Since there is nothing in the IEP delineating which computer programs Petitioner is supposed to use, the mere fact that the school-provided computer programs are marketed to a different age group is irrelevant. Accordingly, the argument is overruled.

Based on the totality of the evidence presented, the undersigned does not believe that the Respondent School District unilaterally changes requirements of the IEP, that the Respondent School District ignores agreements made by the IEP team or that the Respondent School District has unilaterally violated the IEP by selecting computer programs for Petitioner's use. As such, Petitioner's claims of FAPE deprivation are overruled.

Petitioner's mother also insists that the Respondent School District is violating Petitioner's FAPE rights by placing young (junior high school) children in the classroom with Petitioner. Grade classification is a function of the Respondent

School District – in this case, none of the children in Petitioner's classroom is younger than 14 and none of them is classified as 'junior high school'. Regardless of whether Petitioner went to music class at the Junior High School across the street in the previous academic year and, notwithstanding that junior high school students sometimes may come to the high school for instruction in the resource room, Petitioner is totally unaffected. There is no evidence in the record of this matter to indicate how Petitioner's IEP goals and objectives are impaired by the presence of younger students (indeed, the evidence shows that Petitioner doesn't even relate to his peers, Petitioner has a constant 1-1 aide with him throughout the day and there is no evidence of classroom interaction between Petitioner and anyone other than the teacher and aide). Petitioner's mother's argument is senseless.

Petitioner's mother also claims that Petitioner's physical therapy services were not being provided in accordance with FAPE because an independent evaluation was not included in Petitioner's IEP goals. A review of the independent evaluation, together with the testimony of the physical therapist who provides Petitioner's physical therapy services, shows that Petitioner's physical therapy includes the recommendation of the independent evaluator and the physical therapist was already aware of the need for therapy as recommended by the independent evaluator, without regard to the independent evaluation. Regardless of whether the current provider read the independent evaluation, his physical

therapy services are concurrent with the recommendations. As such, Petitioner's argument about FAPE denial is overruled.

Petitioner's mother claims that the District has violated the law by withholding 'educational records' from her. In support of her contention, she points to handwritten notes made at the February 7 and March 26, 2003 IEP transition planning meetings, which notes were not provided to her until the due process hearing began (she initially claimed that she was not provided with a tape of an IEP meeting, which everyone later agreed does not exist). She argues that, if she had the notes beforehand, she could have framed her issues about unilateral alteration of the IEP better. This argument has nothing to do with due process (at best it is a FERPA issue) and, even if the District failed to provide the handwritten notes earlier, the issues of this due process request have not changed. The claim is overruled.

Petitioner's mother also raised an issue about the IEP being incomplete because extended school year services (ESY) were not included in the IEP. As the evidence showed, the Assistant Superintendent intended to defer consideration of ESY until the end of the school year approached so that a better assessment of Petitioner's needs could be established. The evidence also showed that, in approximately April 2003, Petitioner's mother informed the Respondent School District that Petitioner would not participate in ESY services for the 2003 summer. Petitioner's mother insists though, that consideration of ESY should have been

made during the IEP discussions in February and March and that, having failed to include ESY as an element of the IEP, Petitioner is deprived of FAPE. Since Petitioner's mother elected not to include ESY, the undersigned is baffled why this was raised as an issue by Petitioner's mother in this due process hearing request but, if a ruling is required, the undersigned rejects Petitioner's mother's claim.

Fundamentally, with the exception of the issues of the Functional Behavioral Assessment and sign language use, Petitioner's mother's due process claims are truly trivial and superficial. As written in Petitioner's closing arguments "Petitioner [name deleted] is a severely limited student who is entitled to services, who unfortunately is often in the hospital for surgery, or appointments with physicians. Parent has fought for Petitioner's [name deleted] rights for years. District has cut every corner they could in providing services for him. District wanted parent to provide a slant table, computer disks, peanut butter for his lunch, a loaf of bread for his lunch. They have refused to provide services, refused to follow the IEP, changed the terms of the IEP even after consensus was reached, disregarded the written mediation agreement. Is it any wonder parent has lost faith in the District". Petitioner's absences are a remarkable impediment to fulfilling the goals of the IEP (he missed almost one-half of all school days during the immediate past semester) and, because of his absences, one would expect that the IEP team members would exact a level of cooperation commensurate with the limitations before them. Instead, as demonstrated by Petitioner's mother's scattershot, hodge-podge

complaints, the Respondent School District spends more time worrying about capitious issues such as peanut butter than concentrating on developing Petitioner's independent living skills that have been identified in his IEP. When one compounds the divisions between the IEP team members with Petitioner's mother's insulation of Petitioner by insisting on 'pidgin' sign language proficiency, it is amazing that Petitioner is able to make any progress. Yet, he is making progress towards his goals of independent living, increasing his communication skills and developing more mobility and motility.

The evidence shows that Petitioner has significant problems interacting with others in a variety of environments. His transition IEP is designed to overcome those problems by recognizing the long-term consequences of how Petitioner will interact with others in all of the environments in which Petitioner will function. Petitioner has enough limits as it is – there is no reason to limit him further by frustrating his education and training through frivolous and petty disputes. Petitioner is being provided a free, appropriate public education by the Respondent School District. All of Petitioner's due process claims are overruled and rejected.

APPEAL RIGHTS

THIS DECISION IS A FINAL DECISION. Any party aggrieved by this decision may file an appeal with the Arizona Department of Education, Exceptional Student Division, 1535 West Jefferson, Phoenix, Arizona, within thirty-five (35) days following your receipt of this decision.

DATED this 7th day of September 2004.


HAROLD J. MERKOW
Due Process Hearing Officer

DUPLICATE ORIGINALS SENT
TO COUNSEL FOR EACH PARTY